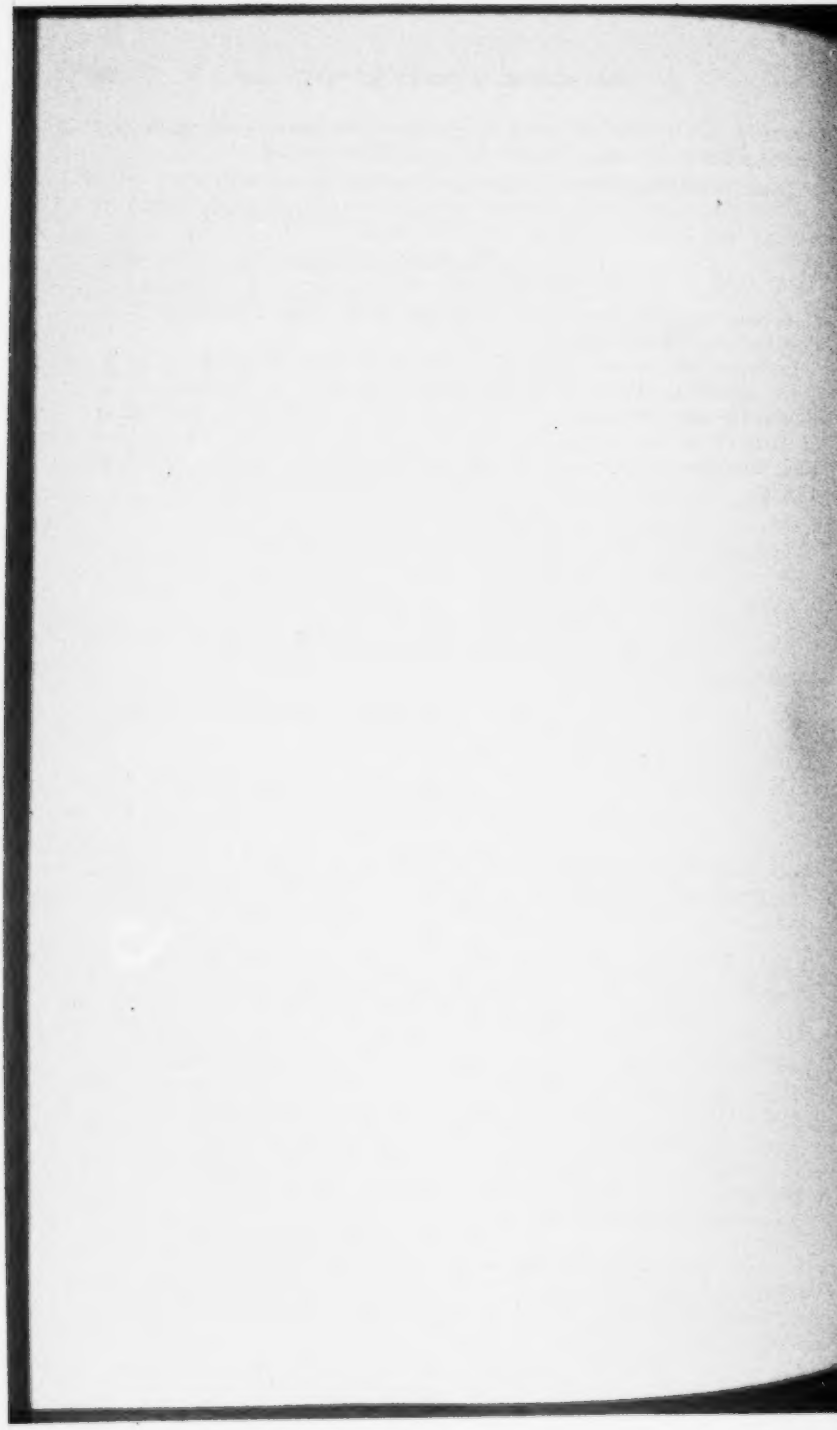

Supreme

EDWARD H. WHITNEY et

LE ROY DENISON and CHARLES

bers of the firm of Denison et

vs.

CHARLES H. WEAVER, STATE

C. BOLDT, THE SECURITY

and UNITED STATES FIDELITY

Brief and Argument on Behalf of

Appeal under Section 5 Act

Chapter 517, Acts Third

Bill for Lack of Jurisdiction

Robert D. Murphy,

George H. Gilman,

Of Counsel.

SUPREME COURT OF THE UNITED STATES.

EDWARD B. WHITNEY as Trustee in Bankruptcy of Daniel Le Roy Dresser and Charles E. Riess, as members of the firm of Dresser & Co.,

Appellant,

against

CHARLES H. WENMAN, Stuyvesant Fish, George C. Boldt, The Security Warehousing Co., and United States Mortgage and Trust Co.,

Appellees.

Brief and argument on behalf of Appellant on appeal under Section 5 of Act March 3d, 1891, Chapter 517 from final decree, dismissing the bill herein for lack of jurisdiction.

Statement.

This is an appeal by the complainant direct to this court from the District Court of the United States for the Southern District of New York,

taken under the provisions of Subdivision 1, Section 5, Chapter 517, Act of March 3d, 1891 (26 Stat. L., 826), from a final decree which sustained a demurrer and dismissed the complainant's bill on the ground that there was no jurisdiction in the court to entertain it without the consent of the defendants which had not been given.

The judge of the district court has certified that the demurrer was sustained and the bill dismissed *only* on the ground that the court did not have jurisdiction of the suit, and he has allowed this appeal (Record, pp. 17-18).

The complainant sued as the trustee in bankruptcy of Daniel Le Roy Dresser and Charles E. Riess, copartners under the name of Dresser & Co., silk and commission merchants in the City of New York.

The bill filed by the complainant, and which has been dismissed, discloses the following facts (which are admitted by the demurrers), upon which he bases his prayer for relief:

Dresser & Co. failed on the 7th day of March, 1903, and, on the 9th day of March, 1903, receivers in bankruptcy were appointed (Record, pp. 2–3).

The complainant was appointed trustee of the bankrupt estate on the 17th day of September, 1903, and on the 29th of the same month he duly qualified as such trustee (Record, p. 2).

For a considerable time before March 7th, 1903, Dresser & Co. and the members of the firm had been insolvent, and they were only able to continue their business by borrowing large sums of money upon the security of the silk which they owned and at the same time concealing this borrowing from their other creditors (Record, p. 3).

In order to do this Dresser & Co. made the following arrangement with the defendant The Security Warehousing Co.

Dresser & Co's. store was at Nos. 15–17 Greene street, New York City. A pretended lease of this store was made by the firm to The Security Warehousing Co., one of the appellees, at a nominal rental of *one dollar* a year in order that it might claim that the store was one of its warehouses and that Dresser & Co's. goods had been delivered by them to it for storage there. As soon as the so-called lease was made The Security Warehousing Co. gave to Dresser & Co. certain papers in the general form of warehousing receipts purporting to cover silk in amounts equal to that which was in Dresser & Co's. store (Record, pp. 3–4).

These so-called warehouse receipts were then given by Dresser & Co. to the defendants either as security for alleged loans which had already been made or which were then alleged to have been made to the firm (Record, p. 4). The relations of the defendants to Dresser & Co. were such that they either knew or were charged with notice of all the facts in connection with the so-called storing (Record, p. 5).

There was no change of possession or control of the silk contained in the Dresser store and pretended by the Security Warehousing Co. to have been stored with it (Record, p. 3).

All that was done was this:

A so-called custodian—, a Miss Fish, the private secretary and confidential clerk of the bankrupt Dresser—was employed at a *salary of one dollar a month* by the Security Warehousing Co. to represent it in the care and custody of the silk. She exercised no control or supervision over the silk,

and she continued to act as the confidential clerk and secretary of Dresser & Co. (Record, p. 3).

That firm continued in possession of the silk and to display and sell it as their own, to send it to the dyers for manipulation, and generally to treat it in the same manner as they had been in the habit of doing prior to the pretended storing (Record, p. 3).

A few small tags, bearing the name of The Security Warehousing Co. were placed upon the bins, shelves and counters where the silk was displayed for sale and stored, They were not easily discernible and in most instances were placed so they were not easily seen. The tags were not worded in such a way as to identify the silks with the so-called warehouse receipts which pretended to cover them, nor did the receipts themselves describe the silks which they pretended to cover in such a way as to render them capable of identification (Record, pp. 3-4).

Under these circumstances it has been repeatedly held by the Court of Appeals of New York that the holder of such a pretended warehouse receipt acquires no rights to the property enumerated therein which are superior to the rights of creditors. The transaction is held to be an attempt to create a chattel mortgage void as against creditors, for want of filing or change of possession. *

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*Yenni vs. McNamee, 45 N. Y., 614.
Button vs. Rathbone, 126 N. Y., 187.
N. Y. Lien Law (Laws 1897, Ch. 418, as amended Laws 1900, Ch. 248).

Section 90: Every mortgage or conveyance intended to operate as a mortgage of goods and chattels, or of any canal boat, steam tug, scow or other

The foregoing shows the condition of affairs with respect to the so-called storing under the pretended warehouse receipts when the receivers of Dresser & Co. were appointed.

What happened afterwards was this:

One of the receivers, Charles S. Mackenzie, was and had been the general counsel of the Security Warehousing Co., and he was the personal counsel and adviser of the bankrupt Dresser. He continued as such general counsel during the entire period of his receivership. Dresser himself was one of the incorporators and a director and stockholder of the Security Warehousing Co., and he was influential in its management and control (Record, p. 4).

When the receivers took possession of the store of Dresser & Co. they found there a large quantity of silk, owned by and in the possession of Dresser & Co., valued at more than $150,000 (Record, p. 5).

After the receivers had taken possession of the property of the bankrupts the Security Warehousing Co. notified them that the store had been leased by it and that all of the silk goods which were there had been delivered to it for storage,

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craft, or the appurtenances thereto, navigating the canals of the State, which is not accompanied by an immediate delivery and followed by an actual and continued change of possession of the things mortgaged, is absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage or a true copy thereof is filed as directed in this article.

and a demand was made by it that the receivers deliver the goods to it (Record, p. 5).

The receivers acquiesced in this claim and complied with it. They did not notify the creditors or the court of the character of the pretended storage nor of the claim, although one of them at least, McKenzie, was entirely familiar with all of the details thereof (Record, p. 5).

Upon further examination it was ascertained by the receivers and The Security Warehousing Co., that there was more silk called for by the outstanding warehouse receipts than there was on hand in Dresser & Co's. store. This deficiency in silk amounted to upwards of Twenty thousand dollars (Record, p. 5).

Thereupon a secret arrangement was entered into between the receivers, acting through Mackenzie and The Security Warehousing Co., without the knowledge of the creditors, under which most of the silk was sold by the receivers as the agents of The Security Warehousing Co., and the proceeds paid over to it The balance of the silk was sold by The Security Warehousing Co. through other agents (Record, p. 5).

Under a further secret arrangement, and presumably to protect The Security Warehousing Co. against the deficiency in silk above mentioned, the outstanding accounts of Dresser & Co. were collected by the receivers and the proceeds also turned over to The Security Warehousing Co., until the value of the missing silk was made up (Record, pp. 5-6).

As has been stated, there was nothing on the face of the warehouse receipts to show the particular silks which each receipt pretended to cover, and the plan pursued by the receivers was to sell

the silk as a market offered and turn the proceeds over to The Security Warehousing Co., without regard to what receipts they might be pretended to be covered by, or *as to whether the particular silk sold was pretended to be covered by any of the receipts.* The net result was that *all* of the $150,000 worth of silk was sold by the receivers or the other agents and the proceeds paid to The Security Warehousing Co., and in turn paid by that company to the other defendants to cancel the receipts held by them respectively and the balance retained by it on account of its own loans to Dresser & Co., and to cover certain improper payments which it had made (Record, pp. 5, 7).

The same course was pursued with respect to the $20,000 of outstanding accounts which the receivers collected and paid over to The Security Warehousing Co.

All of this was done by the receivers without any reference to the court, without advising the other creditors (Record, p. 5), *and presumably by the advice and procurement of Receiver Mackenzie in the interest of The Security Warehousing Co. of which he was the general counsel, and to relieve that company from its liability on the pretended warehouse receipts which it had issued.*

The receivers remained in possession of the estate for some eight months, during which time all of the silk was sold and the accounts collected and their proceeds paid over (Record, p. 6.)

Shortly after the complainant was elected as trustee he received from The Security Warehousing Co. $1,944.93, which was stated to be the surplus remaining from the sale of the silk after paying the loans of itself and the other defendants made on the pretended receipts and after the disbursements made by it had been paid (Record, p. 6).

The silk sold for less then $125,000. It cost Dresser & Co. *in Japan* upwards of $150,000, and its wholesale market value in New York was more than 20% greater than this purchase price (Record, p. 7).

The books and papers of The Security Warehousing Co. containing all of the information concerning the sale and disposition of the proceeds of the silk and the accounts receivable *have all been lost or destroyed* by that company (Record, p. 6).

Upon these facts the bill prays for a decree directing the defendants to pay over to the complainant the moneys received by them as above stated on the ground that the silks and accounts receivable belonged to the estate of Dresser & Co., and that the pretended warehouse receipts be declared null and void as against the creditors of Dresser & Co. and their trustee in bankruptcy. The prayer also asks for certain other incidental equitable relief applicable to the facts as pleaded (Record, p. 8).

To this bill all of the defendants except the United States Mortgage and Trust Co. demurred on the ground that the District Court of the United States did not have jurisdiction of the matters set forth therein.

The complainant claimed that the court had jurisdiction on two grounds:

1st. That the silk and outstanding accounts having been in the possession of Dresser & Co., at the time when the receivers took possession passed into the custody of the court through its agents, the receivers. That they have never left that custody by reason of any act or thing binding upon the court, that they are still *in custodia legis*

and that everything which may have been done with or in respect to the silk and the accounts by the receivers and the defendants has been done wrongfully and that in respect thereto they are subject to the jurisdiction of the court.

2d. That even though the silk and accounts did not come into the possession of the court free and clear of the claims of the defendants, nevertheless those claims were based upon void transfers, or attempted transfers, made by the bankrupt prior to the bankruptcy, as to which the amendment to § 70e of the Bankruptcy Act expressly gives jurisdiction to the district court.

The district judge held that the demurrer should be sustained on the ground that § 70e, as amended, only gave the district court jurisdiction over controversies respecting transfers made by the bankrupt *prior* to the bankruptcy, while the present suit was to recover property *transferred* by the receivers *after* the bankruptcy. He then argues that jurisdiction could, therefore, only exist in the court on the theory that the silk and accounts were at some time *in custodia legis*.

He then negatives this contention on the ground that the silk and accounts came into the possession of the receivers, if they ever came there, subject to the claims of the defendants, based upon their previous transactions with Dresser & Co., and he holds that this fact prevented their passing into the custody of the court, so as to give it. from that fact alone, jurisdiction over their distribution.

In this line of reasoning the judge apparently overlooked the obvious inconsistency into which it led him, since if the court did not have custody by reason of the colorable transfers made by

Dresser & Co., prior to the bankruptcy, which transfers are void as to the creditors of Dresser & Co., then a case is presented which the amendment to 70e was expressly intended to cover.

Assuming that 70e, as amended, gives the court jurisdiction of suits by a trustee in all cases where a creditor of a bankrupt might have sued to set aside transfers, made by the latter of his property, then the facts disclosed by the bill necessarily clothe the court with jurisdiction since the accounts and silk either went into the possession and custody of the court through its receivers immediately on their appointment, in which case for that reason alone the court had jurisdiction of this suit; or, if there *was no possession and custody* on the part of the court, then it was by reason of *a transfer by the bankrupt void as against his creditors* (Lien Law, *supra*) as to which the amended Section (70e) *expressly* gives jurisdiction.

The dilemma into which the learned judge has fallen is very apparent:

Either the property was in the possession of the court through its receivers, in which case there is jurisdiction for that reason.

Or else it was transferred by the bankrupts prior to the bankruptcy, in which case 70e, as amended, expressly gives jurisdiction.

This dilemma probably arose from an oversight as to the logical result of the argument to show that the court never had custody of the subject matter of the suit.

But two points of law will be submitted on this appeal, and only briefly touched upon:

1st. That the court had jurisdiction because it had custody of the silk and accounts.

2nd. That Section 70e, as amended, expressly confers jurisdiction in a suit to set aside just such transfers as are disclosed by the bill.

Specification of Errors relied upon by the Appellant.

The errors relied upon by the appellant are as follows:

1st. That the District Court of the United States for the Southern District of New York erred in sustaining the demurrer of the defendants and dismissing the complainant's bill on the ground that it had no jurisdiction of the matters therein set forth.

2d. That the District Court of the United States for the Southern District of New York erred in not overruling the demurrer of the defendants and holding that it had jurisdiction over the matters set forth in the complainant's bill.

POINTS.

I.

The District Court of the United States for the Southern District of New York has jurisdiction over this suit, because the subject-matter thereof is in its custody.

It is the contention of the appellant that this suit falls within the class of cases represented by White vs. Schloerb (178 U S., 542), and not within the class represented by Bardes vs. Bank (178 U. S., 524).

When the receivers went into possession of the store and property of Dresser & Co., the silks and accounts in question were in the possession of the bankrupts, and passed from that possession into the receivers' possession. This is specifically alleged in the bill (Paragraphs 18 and 22, Record, pp. 5, 6), and it is previously alleged therein that they always had been in the possession of the firm of Dresser & Co., and never were in the possession of any one else (Paragraphs 8, 9 and 16, Record, pp. 3, 4), besides which the whole bill discloses a course of dealing with respect to the silks and accounts which negatives any possession in the appellees or any one else, other than Dresser & Co., and the receivers. There was no intermediate period between the possession of Dresser & Co. and that of the receivers during which the appellees or any person on their behalf had possession. The statement contained in the opinion of the learned district judge to the effect that "The

receivers found some one else in the bankrupts' store, claiming adversely, and apparently acquiesced in the claim" (Record, p. 16) is unsupported by any allegation in the bill and must have been taken from some statement contained in the briefs of the appellees or made by their counsel upon the argument.

The rule laid down by this court in Bardes vs. Bank that a suit against an adverse claimant under 23b of the Bankrupt Act must be brought in the court where the bankrupt might have sued, only applies to an adverse claimant who has obtained possession of the property in dispute prior to the filing of the petition (Muller vs. Nugent, 184 U. S., 1, pp. 15, 16), and it does not apply to a suit such as this or White vs. Schloerb, where the property in dispute went into the possession of the court, and thereafter was taken away by a third party under a process issued out of another court as in the Schloerb case, or by collusion with the receivers, as in the present case. In such a case the rules applicable to the administration of property in the custody of courts of equity apply.

Where a court of equity has taken possession of property for any reason, and has placed it in the custody of receivers, sequestrators or custodians, it will maintain its possession of such property and will determine all rights with respect thereto, even though the actual physical custody of the property may have been parted with by its officers, either under void orders of the court (Minnesota Co. vs. St. Paul Co., 2 Wallace, 609, pp. 632-33-34) or where the property has been obtained from the receiver or other court officer, through collusion with him (as in this case) or by fraud (De Winton vs. The Mayor of Brecon, 28 Beavan, 200, p. 203).

Where property is in the possession of a court of the United States, as in the present case, its jurisdiction to determine all claims with respect thereto is not dependent upon citizenship of the parties, but upon the fact that the court has taken the property into its custody (Morgan's Co. vs. Texas Central Ry. Co., 137 U. S., 171, p. 201).

Even though the property comes into the possession of a receiver by mistake, he must still hold it, as it is in the custody of the court and the rights of all parties with respect thereto must be determined by that court (Smith vs. Express Co., 135 Ill., 279, p, 292).

A receiver has no right to accept the mere word of a third party claiming property in his possession, and if he does so and upon representations made by such person, delivers the property to him without an order of the court, his action is not binding upon the court, and does not change the legal possession and custody of the property or the right of the court to determine all claims in respect thereto (Sharpe vs. Doyle, 102 U. S., 686, p. 690).

The determination of the rights of all parties to property in the custody of the court where that property has been parted with by an officer of the court, is properly by means of a bill in equity, which, though a separate and distinct suit, is in effect ancillary and supplemental to the original suit or proceeding in which the property was originally taken into the custody of the court (Minnesota Co. vs. St. Paul Co., 2 Wallace, 603, pp. 633-4).

If a district court of the United States has not, under the circumstances set forth in the bill of

complaint, jurisdiction to determine the rights of all parties with respect to the silks and accounts therein described, then we have presented to us the following remarkable situation:

Upon the filing of an involuntary petition in bankruptcy, and on application being made by the petitioning creditors, receivers are appointed. They take possession of the property of the bankrupt. A great portion, and, in fact, practically all of this property consists of a valuable lot of silk goods and a number of accounts receivable. Thereafter a third party appears and states that the bankrupts' store belongs to it, under an alleged lease. This third party then claims that *all* of the silk goods (valued at upwards of one hundred and fifty thousand dollars) have been stored with it in the bankrupts' store, which it terms its warehouse. *One of the receivers is the counsel and attorney for this third party, and one of the bankrupts a stockholder and director.*

Without any reference to the court, without notice to the creditors, and without a question, this claim is secretly acquiesced in.

Thereafter, the third party states that it has issued warehouse receipts against the silks, and that they have been delivered to other persons. It also states that the warehouse receipts so issued call for more silks than are found in the bankrupts' store and it demands from the receivers payment for the deficiency. Again the receivers, without notice to the court or to the creditors, secretly acquiesce in this demand, and to obtain the money they collect, as receivers and as officers of the court, over $20,000 of outstanding accounts belonging to the bankrupts, and pay over the pro-

ceeds to the third party in satisfaction of this claim.

The receivers remain in possession for some eight months, during which time all of the silk goods are sold, the accounts collected and the proceeds paid over under a secret arrangement to the third party.

A trustee is then elected. Upon discovering what has taken place, he appeals to the court to determine whether or not what the receivers had done was proper, and whether or not the creditors of the bankrupts are not entitled to the silk goods and to the accounts so secretly delivered and paid over. To his prayer the court replies in effect:

> "It is true that this court did take into its "custody property of great value found in the "possession of the bankrupts at the time of the "filing of the petition, and collected many of "the outstanding accounts of the bankrupts, "but for some reason or other, its officers, "without reference to it, and without notice "to anyone, saw fit to deliver the property "and the proceeds of the accounts to a third "person. This court is, therefore, powerless. "You may have made out a strong "case upon the face of the bill. All "of the facts which you allege may "be true, and for the purpose of deter- "mining the court's jurisdiction on demurrer, "they must be considered as true. But you "must go to some other tribunal to enforce "your rights. This court is powerless."

The situation so disclosed is absurd. It is submitted that there can be no question but that the district bourt has entire jurisdiction by plenary

suit to determine the rights of all parties with respect to the silk and accounts. *They are still in its custody.* What the receivers did has not altered the situation in the least. They parted with the property entrusted to them as the representatives of the court, without right and without authority, and nothing which they have done is binding upon the court or upon the parties in interest.

II.

Section 70e of the Bankrupt Act, as amended, expressly confers jurisdiction upon the District Court of a suit to set aside transfers made prior to the filing of a petition.

Section 70e, as amended, gives to the trustee the right to avoid any transfer of his property made by a bankrupt which any creditor might have avoided, unless the property is in the hands of a *bona fide* holder for value, and any court of bankruptcy is given jurisdiction over an action brought by the trustee for this purpose.

Assuming that the silks and the accounts never were *in custodia legis*, then, as has been pointed out in the statement with which this brief is prefaced, they must be considered as having been transferred prior to the bankruptcy. This was the view which the learned district judge took, but he failed to appreciate that the result of his reasoning brought the transaction under 70e, as amended.

The appellees are not *bona fide* holders of the silks and accounts. They certainly were not *bona fide* holders of the accounts, since the bill discloses the fact that the accounts collected had nothing to do with the silk pledged. The payment of the proceeds of these accounts to the appellees was therefore a pure gratuity on the part of the receivers.

As to the silks, the possession remained in the bankrupts, and there was no change of custody or control in any way. All that the appellees received were certain papers in the form of warehouse receipts. These receipts did not vest any title in the appellees, unless there had been a change of possession of the silks themselves from Dresser & Co. to that of The Security Warehousing Company.

Even though there had been a change of possession if there was any vice or defect in the warehouse receipts, the appellees were not *bona fide* holders for value, with respect thereto, so as to cut out any adverse claim to the silks (Shaw vs. R. R. Co., 101 U. S., 557; Pollard vs. Vinton, 105 U. S., 7).

It is true that the appellees who hold these warehouse receipts can enforce them against the Security Warehousing Company, (if they did not know of the fictitious bailment), but this is by reason of an estoppel which exists in their favor because of the representations therein contained, namely, that The Security Warehousing Company, had goods of the value and sort set forth in the receipts which it promised to deliver to the holder thereof upon the terms therein stated (Friedlander vs. Texas and Pacific Ry. Co., 130 U. S., 416, p. 424; The Carlos F. Roses, 177 U. S., 655, p. 665).

The bill discloses, however, that the silks were never stored with The Security Warehousing Company, and under the decisions of the courts of the State of New York, such a transaction is voidable by the creditors of the owner of the goods, because it is an attempt to create a chattel mortgage without change of possession and without filing as required by statute (Yenni vs. McNamee, 45 N. Y., 614; Button vs. Rathbone, 126 N. Y., 187).

It may be that the appellees are *bona fide* holders of a piece of paper purporting on its face to be a warehouse receipt for a certain amount of silk, and that The Security Warehousing Company is estopped from denying that such is the case, and is bound to make the receipt good; but as to the creditors of Dresser & Co. and as to the silks involved in this suit, the appellees are not *bona fide* holders.

Standing by itself, Section 70e, as amended would leave no doubt as to the jurisdiction of the court. The language of the amendment is clear and simple. If it does not give jurisdiction, then it means nothing at all, and in the construction of a statute such a lack of meaning will not be presumed.

On the argument below, the appellees laid great stress upon the fact that the amendment to Section 23b, as originally passed by the House of Representatives, included a reference to Section 70e, as well as to Sections 60b and 67e.

In the Senate the amendment to 23b was altered by striking out any reference to 70e. So that, taken by itself, Section 23b only permits a suit by a trustee to be brought or prosecuted in the courts where the bankrupt might have brought or prose-

cuted it, unless the proposed defendant consents, except suits for the recovery of property under Sections 60b and 67e.

The argument of the appellees was that, as the defendants had not consented to the bringing of this suit. 70e, as amended, although it specifically gives jurisdiction, must still be considered as limited by the general provisions of 23b.

The opinion of the learned district judge assumes that suits by a trustee in bankruptcy, without the consent of the defendant, may be brought in the district court under Sections 60b, 67e and 70e, and does not refer to the argument of the appellees upon this point.

The case of Gregory vs. Atkinson (127 Fed., 183), was much cited and referred to by the appellees in support of their argument that 70e does not give jurisdiction where the defendants do not consent. The opinion of the learned judge deciding that case seems to set forth all that can be said in favor of such a contention. There are several decisions in the district courts and in the circuit courts of appeal which hold that 70e does give jurisdiction without the consent of the defendants (Horskins vs. Sanderson, 132 Fed., 415, p. 416; *In re* Leeds Woolen Mills, 129 Fed., 922, p. 926; Pond vs. N. Y. Nat. Exchange Bank, 124 Fed., 992; Lawrence vs. Lowrie, 133 Fed., 995; Delta National Bank vs. Easterbrook, 133 Fed., 521).

The question has not, as yet, been passed upon by this court.

It is submitted that the well known rule that, in construing a statute, a meaning must be given to each and every part thereof, requires that the plain intent as expressed in the amendment to

70e, that suits of the character therein enumerated may be brought in the district court, requires a construction which will confer such jurisdiction, and not a construction such as is contended for by the appellees, which will render its language meaningless. It was suggested below that 70e, as amended, simply intended to confer upon the district court jurisdiction over the subject matter, and not over the person. This contention is not tenable, since the district court prior to the amendment had jurisdiction over the subject matter, but not over the person, except by consent.

23b is a general provision, and 70e is a special one. Where there is any conflict between a general and a special provision, the universal rule of construction requires that the special provision shall be considered as an exception to the general rule, contained in the general provision (Townsend vs. Little, 109 U S., 504, p. 512; U. S. vs. Nix, 189 U. S., 199, p. 205).

The proceedings in the Senate at the time of the passage of the amended act afford no clue to the reason for striking out the reference to 70e in 23b, and the committee which struck out this reference rendered no report; but it is safe to assume that 70e, as amended, was intended to mean something and that if the reference thereto in 23b was struck out for any reason, it was because the suits there referred to are such as might have been brought or prosecuted by the bankrupt, while the suits referred to in 70e are only such as might have been brought by a creditor of the bankrupt.

Whatever may have been the intention of Congress—and there is no means of ascertaining what that intention was—it certainly will not be pre-

sumed that it intended to amend 70e for nothing. The intention of the amendment to 70e certainly was to confer jurisdiction upon the district courts over suits brought thereunder, and to escape from the limitations laid down in Bardes vs. Bank. There can be no other possible meaning to the words of the amendment, and the courts will not disregard that clear meaning on the theory that the amendment was *perhaps* inadvertently passed.

II.

The order and decree of the District Court of the United States for the Southern District of New York dismissing the bill herein should be reversed and the cause remanded to that court with instructions that it take jurisdiction thereof.

Respectfully submitted,

ROBERT D. MURRAY,
GEORGE H. GILMAN,
Counsel for Complainant-Appellant.

[6747]